



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Speedy Food Service, Inc.--Reconsideration

File: B-260298.3

Date: April 20, 1995

Theodore M. Bailey, Esq., Bailey, Shaw & Deadman, for the protester.

DIGEST

Provisions of Federal Acquisition Regulation stating that contracting officer having "substantial doubt" about a potential section 8(a) contractor's responsibility "should" refer the matter to the Small Business Administration (SBA) does not preclude a referral in other circumstances; regulatory scheme permits an SBA referral whenever a contracting officer has doubt concerning a potential section 8(a) awardce's responsibility.

DECISION

Speedy Food Service, Inc. requests reconsideration of our February 24, 1995, dismissal of its protest of the Department of the Air Force's negative responsibility determination and referral of that determination to the Small Business Administration (SBA) under solicitation No. F41652-94-R-0057, a competitive section 8(a) program procurement. We dismissed that protest because we viewed it as not presenting a valid basis for protest.

In dismissing the protest, we pointed out that (1) contracting officials have wide discretion to determine whether to award a contract under the section 8(a) program, (2) it is appropriate for contracting officials to take into account concern with the ability of a prospective awardee to perform to contract, (3) Federal Acquisition Regulation (FAR) § 19.809 permits referral to the SBA of such concerns when the contracting officer has "substantial doubt" about the matter, and (4) ultimately it is a decision for the SBA to make.

On reconsideration, Speedy states that its protest challenged whether there was substantial doubt on the part of contracting officials as to Speedy's responsibility. Speedy argues that the regulations do not permit a referral to the SBA in the absence of "substantial" doubt. Speedy also reiterates its challenge to the SBA's decision that Speedy was not eligible for award.

We do not agree that the regulations limit the contracting officer's right to refer a responsibility-related concern to the SBA. FAR § 19.809 states that when "information available to the contracting officer raise[s] substantial doubt as to the firm's ability to perform, the contracting officer should refer the matter to the SBA" This language does not preclude referral in any particular circumstance; it merely specifies when a referral should be made. Moreover, the language must be read in the context of the broad discretion contracting officers and the SBA have to determine whether any particular contract should be awarded through the section 8(a) program. To read the regulation as precluding referral in situations where a contracting officer is sufficiently concerned with a company's ability to successfully perform such that he is uncomfortable proceeding with an award without a further review by the SBA would be inconsistent with the joint and cooperative roles played by both the SBA and the contracting agencies in the section 8(a) contracting program. See generally 15 U.S.C. § 637(a) (1988 and Supp. V 1993); 13 C.F.R. §§ 124.307, 124.308 (1995); FAR §§ 19.800, 19.803, 19.804; Morrison Constr. Servs. Inc., 70 Comp. Gen. 139 (1990), 90-2 CPD ¶ 499. In other words, we view the statutory and regulatory scheme governing section 8(a) awards as permitting a contracting officer to refer any meaningful doubts about a potential section 8(a) contractor's responsibility to the SBA for that agency's determination pursuant to 13 C.F.R. §§ 124.311(f)(4)(ii), 124.313.

As for the SBA's action, Speedy states that the SBA found Speedy ineligible not because of the responsibility factors (capability, competency, credit, integrity, tenacity, and perseverance) identified in 13 C.F.R. § 124.313, but because of the percentage of competitive business of Speedy's total job mix. Speedy asserts that this violated the regulatory provision and therefore is subject to our review. This specific basis for protest was not raised in Speedy's initial protest; Speedy asserted only that the SBA abused its discretion in determining that Speedy was ineligible. Therefore, it is not an appropriate basis for reconsideration. In any event, 13 C.F.R. § 124.311(f)(4)(ii) provides that when the contracting officer makes a responsibility referral, the SBA shall determine eligibility at that time as well as responsibility. A section 8(a) company's business mix is a matter of concern to

the SBA, see 13 C.F.R. § 124.312, and under this regulatory provision, the SBA may take remedial action with respect to a firm's failure to achieve the appropriate mix. Accordingly, we see nothing in SBA's actions that would be violative the applicable regulations.

The request for reconsideration is denied.

Robert P. Murphy
General Counsel